(1) Supreme Court, U.S.
FILED

97 965 DEC 10 1997

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

J.C. HERBERT BRYANT, JR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Special Deputy U.S. Marshal is an "officer or employee" of the United States Government as proscribed by Title 18 United States Code, Section 912.

2. Whether the Appellant Court had "jurisdiction" to correct what it called a "gross injustice".

LIST OF PARTIES

The names of all parties to the proceeding below appear in the caption of this case.

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The petitioner, J.C. Herbert Bryant, respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on July 8, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 117 F.3d 1464 (D.C. Cir. 1997) and is reproduced at Pet. App. A.

JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia Circuit was issued on July 8, 1997. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Title 18, United States Code, Section 912, provides in pertinent part:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.

STATEMENT

1. Introduction

This petition presents two significant questions on which the federal courts of appeals are in conflict.

First, the petitioner seeks review of the D.C. Circuit's refusal to find that Title 18, United States Code, Section 912 does not make a person so appointed an "officer or

employee" of the U.S. Government as proscribed by Title 18, United States Code, Section 912.

Second, the petition seeks review of the D.C. Circuit's refusal to correct what it called a "gross injustice" in the prosecution and conviction below. Despite its limited jurisdiction, faced with the conflicting testimony below and refusal by the District Court Judge to consider defendant's testimony along with the corroborating testimony, the D.C. Circuit should have reversed the conviction below.

2. Factual Background

The petitioner, J.C. Herbert Bryant, Jr., had been a Special Deputy U.S. Marshal for seven years by virtue of his affiliation with a group of volunteers (ARGUS) (the Armed Response Group of the United States), which loaned armored vehicles to police agencies during emergencies. In 1992, *The Washington Post* published a series of articles critical of ARGUS and of Bryant, implying that he had been granted Special Deputy status because of his family money and political connections. *See, e.g.*, Robert O'Harrow, Jr., *FBI Probes Self-Styled Police Force*, WASH. POST, May 10, 1992, at A1. The then-director of the Marshals Service Henry Hudson wrote Bryant advising him to send Hudson a letter asking not to be reappointed, which Bryant did. His appointment thus expired on June 30, 1992, only two months before the events leading to his conviction.

On September 2, 1992, Bryant drove his truck into the District of Columbia and parked it near the side entrance of the Mayflower Hotel. In the window was a placard bearing the words "U.S. Marshal" in bold print and in back were several pistols, visible if you walked up to the vehicle. After a brief time inside the hotel, Bryant emerged to discover that

the vehicle had attracted the attention of several governmental officials due to the fact that, unbeknownst to Bryant, an Israeli diplomatic delegation had been visiting the hotel.

Bryant approached the vehicle and identified himself as its driver and was questioned. Numerous conversations were had, but Bryant was not arrested and/or charged, however, he and his vehicle were taken from the scene, and arguably from the Metropolitan Police central, by members of the U.S. Marshal's service to the U.S. Marshal's office.

Washington Post reporter Mr. O'Harrow, learning of the incident, published a news story in the *Post* some three weeks later, on September 24, accusing the Marshals Service of intervening to help Bryant.

After Bryant told police he had friends in the Marshals Service, a deputy marshal was sent to the scene, law enforcement officials said... When asked why no legal action was taken against Bryant, Twomey said the District police officer 'chose simply to turn the weapons and Mr. Bryant over to the marshal.' But the District police official, who ordered the retrieval of Bryant's guns from the Marshals Service yesterday, said Bryant was released only because *the Marshals Service* 'represented to us he was a U.S. Marshals deputy.'

Robert O'Harrow, Jr., *Quasi-Police Official Freed in Gun Case*, WASH. POST, Sept. 24, 1992, at A1 (emphasis added). Only then does the question of appellant's misrepresentation arise. *Id* ("[A]fter inquiries from the Washington Post, District police said they plan to investigate the Sept. 2 incident and turn over their findings to the U.S. attorney in the District.") Both the marshals' headquarters and the Marshals Office in the District of Columbia disclaimed

responsibility for allowing Bryant to be released and at trial blamed each other for improper behavior.

From this incident, almost two (2) years later, (June 14, 1994) Bryant is indicted for (A) violating Title 18, United States Code, Section 912, by falsely assuming and pretending to be a Special Deputy United States Marshal, and due to same, demanding and obtaining he not be arrested; and (B) for violating D.C. Code, Section 22-3204(4) , a misdemeanor for having weapons in the district, and for (C) violating Title 18, United States Code, Section 1001 for making false statements.

In October of 1994, Bryant elected to go to trial before the Honorable Royce C. Lambreth, U.S. District Judge, waiving a jury and proceeding solely as a bench trial.

Mr. Bryant's principal defense to the firearms charge was that he was a duly sworn authorized deputy sheriff of Warren County, Mississippi and therefore exempt from the D.C. Code prohibiting the possession of a firearm. (He never relied on the expired SDUSM status).

As to the other counts, Mr. Bryant testified and maintained that he never said he was, in-fact, a Special Deputy United States Marshal and this was corroborated by other, non-biased witnesses at the scene.

However, the district judge convicted Bryant on counts 1 and 3 and acquitted him on Count 2 (the weapons charge).

Your petitioner appealed this conviction, and on July 8, 1997, the Court of Appeals for the District of Columbia "affirmed" these convictions. Interestingly, however, Judge

Henderson, writing for the majority, wrote a separate concurring opinion, as did Judge Silberman, and both conclude by saying that, your petitioner not only should not have been convicted, but never should have even been prosecuted, and this case was a "gross injustice".

3. The District Court Proceedings

A bench trial was held in October of 1994 at which Bryant testified that he never stated to anyone on September 2, 1992, that he was a Special Deputy United States Marshal. He further testified, along with his life-long friend, Sheriff Paul Barrett [See 111 F.3d. 947 (D.C. Cir. 1997), cert. den. 118 S.Ct. 176 (1997)] that he was exempt from the prohibition, Section 22-3205 due to his status as a deputy sheriff of Warren County, Mississippi.

Numerous witnesses testified, and conflict abounded! Diplomatic Security Service Agent Mark Conord testified that Bryant identified himself as a Warren County deputy, but also as a Special Deputy U.S. Marshal (10/3/94 TR.1, 12, 45). However, as Judge Silberman points out, it was Conord who allowed the matter to be turned over to the U.S. Marshals, and he was , in-fact biased because he was responsible. Plus, his testimony was hardly convincing, especially with his partner, Agent Perkins saying "...nobody ever told me Mr. Bryant says he is a Special Deputy U.S. Marshal"

Due to the confusion and/or for whatever reasons, MPD officers on the scene called the District of Columbia U.S. Marshals Office to clarify the situation. Rather than telling MPD, Bryant isn't "one of them"(...if he really said he was), they dispatched several Deputy U.S. Marshals to the scene. Deputy Robert Williamson, a supervising deputy arrived and testified later that he inferred/heard Bryant say he

was a SPUSM. (10/4/94, TR. At 21,27) yet he too never told his superior or anyone else until trial.

Ironically, and yet one of the essential elements under this statute, the testimony at trial developed that it was Herbert M. Rutherford III, (then U.S. Marshal for the District of Columbia), who "demanded and obtained" that Bryant not be arrested and had him, his vehicle, and its contents brought to the Marshals office.

Despite this troublesome conflict, and in the face of the clear, unbiased testimony of Agent Perkins, and others, including Carl Crawford, security director for the Mayflower Hotel, on-the-scene - vouching for Bryant's "denial" and depiction of events, Judge Lambreth finds him guilty.

The court as to count 1 specifically found that Bryant claimed to be a Special Deputy U.S. Marshal, during the course of his detention at the Mayflower Hotel, crediting the testimony of Agent Conord and Deputy Williamson. (10/16/94, Trial 7) He "rejected" Bryant's testimony and others on Count 3, and similarly he found that Bryant represented to Agent Conord and to Deputy Williamson he was a Special Deputy U.S. Marshal (The Judge "acquitted" Bryant of the firearms charge).

On August 31, 1995 the Court sentenced Bryant to six (6) months incarceration.

Mr. Bryant appealed his conviction, however, the D.C. Circuit "affirmed" both convictions in a highly unusual opinion.

4. The D.C. Circuit's Ruling

The case was argued before Judges Silberman, Henderson and Tatel, with Judge Henderson writing the opinion for the Court and also writing a concurring opinion as did Judge Silberman.

At oral argument, prior to an opinion being rendered, Judge Henderson, on the Court's own motion, requested "supplemental briefs" on the issue of whether a Special Deputy U.S. Marshal was covered by Title 18, United States Code Section 912. Both sides briefed the issues and submitted same prior to the July 8, 1997 ruling.

The court in its opinion, despite the apparent conflicts, declined to reverse the conviction due to the deference afforded the trial judge. Ironically, despite Judge Henderson raising the above-issue at oral argument, she never addressed it in the majority opinion, but concludes in her concurring opinion that she believes a Special Deputy Marshal is not an officer or employee of the U.S.... the impersonation of which is prohibited by Title 18, USC 912. Further she believes that the circuit precedent is wrong!

Also, Judge Silberman, joined in the majority affirmation, but wrote separately, ending by saying he was powerless, given the scope of review of a district judge's factual finding from seeking to rectify this gross injustice!

Lastly, both Judge Henderson and Judge Silberman stated that not only would they never have convicted Bryant, neither would have even prosecuted him for these alleged acts and unusual circumstances.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A CONFLICT AMONG THE CIRCUITS AND/OR NO CLEAR MANDATE AS TO WHETHER A SPECIAL DEPUTY UNITED STATES MARSHAL IS AN "EMPLOYEE OR OFFICER" AS PROSCRIBED BY TITLE 18, UNITED STATES CODE, SECTION 912.

Basically, your petitioner submits that (A) the Special Deputy United States Marshal designation/appointment does not make one so appointed an "employee or officer" of the United States Government, and (B) there was no constitutional authority for appointment of special deputies, and (C) Special Deputy United States Marshals are honorary posts and clearly distinguishable from Deputy United States Marshals.

Title 18, United States Code, Section 912, commonly referred to as "Personation of a Federal Officer" proscribes "falsely assum[ing] or pretend[ing] to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof. . ." 18 U.S.C. Section 912. It is a conviction under this statute which, in part, forms the basis of Bryant's appeal.

Neither Title 18, generally, nor Section 912, specially, define "officer" or "employee" as the terms are to be applied when enforcing the statute. Thus,

> the governing principles indicate that penal statutes are to be interpreted with exactitude.

"Reasonable precision in the definition of crime has been regarded as a desideratum by free people since the early days of common law." Moreover, the specification of criminal offenses is peculiarly the business, not of courts, but of legislatures. ***Criminal statutes are thus "to be construed strictly, not loosely;*** [s]tatutes will not be read to create crimes. . . unless the purpose so to do is plain," and ***"ambiguity" concerning the ambit of criminal statutes "should be resolved in favor of lenity."*** Zaimi v. United States, 476 F.2d 511, 523-24 (D.C. Cir. 1973) (citations omitted) (emphasis added).

The United States Supreme Court held in Pierce v. United States, 314 U.S. 306, 86 L.Ed. 226, 62 S. Ct. 237 (1941), "[w]hile this act [§ 912's predecessor] should be interpreted so as to give full effect to its plain terms, the court should not depart from its words and context." 314 U.S. at 311-12; 86 L.Ed. at 231; 62 S. Ct. at 240 (holding an officer or employee of a government corporation is not an officer or employee of the government under the language of the statute). Although the Pierce court addresses corporations owned or controlled by the United States and distinguishes them from "the government" language as contained in the statute, the law is equally applicable to the distinctions existing between Special Deputy U.S. Marshals and federal officers and employees. As in Pierce where the Court refused to expand the language of the statute, this Honorable Court is prohibited from departing from the the plain terms of "officer or employee" as contemplated by the drafters of § 912. Expanding "officer or employee" to include a Special Deputy United States Marshal, who is not an officer or employee, is error.

"As a general rule, an officer of the United States is one who holds his place by virtue of an appointment by the President, by one of the federal courts of justice, or by the heads of federal departments authorized to make such appointment . . . it must be something more than employment." 63 Am. Jur 2d, Public Officers and Employees, § 18, p.679 (1984) (citations omitted). "Although individuals may occupy positions which are publicly funded and authorized by statute, this does not compel the conclusion that they are public officers. Instead, it is the nature of the office, the powers wielded, and the responsibilities carried out that are the key considerations." Id. at § 12, 675-76.

Bryant asserts that under no definition does "Special Deputy United States Marshal" qualify as an officer or an employee. The disclaimer plainly depicted on the identification cards issued to Special Deputies, states:

> The individual named herein is appointed, under authority delegated by the Attorney General, to perform th[illegible]ties of the Office of Special Deputy United [illegible]es Marshal as directed by an appro[illegible] official of the United States Marshals Service or some other appropriate Federal official as so designated. ***This appointment does not constitute employment by the United States Marshal Service, the United States Department of Justice, or the United States Government.*** The appointee agrees to perform the duties required under this Special Deputation with the knowledge ***that he or she is neither entering into an employment agreement with the Federal Government or any element***

> ***thereof nor being appointed to any position in the Federal Service by virtue of this special deputation***. The appointee understands and acknowledges that the authorities vested in him or her by this special deputation can only be exercised in furtherance of the mission for which he or she has been specially deputized and extends only so far as may be necessary to faithfully complete that mission. Moreover, those authorities terminate at the expiration of the term of the Special Deputation.

It seems apparent from the specific language above that a special deputy is not an employee and cannot be considered more than an employee. Therefore, he cannot qualify as an officer or as an employee under the statute.

Additionally, when Bryant was a special deputy he received no compensation for the title bestowed upon him. Lack of compensation further evidences the lack of official or employment status of a special deputy. See Metcalf & Eddy v. Mitchell, 269 U.S. 514, 70 L.Ed. 384, 46 S. Ct. 172 (1925); Hall v. Wisconsin, 103 U.S. 4, 26 L.Ed. 302 (1880); United States v. Germaine, 99 U.S. 508, 25 L.Ed. 482 (1879); United States v. Hartwell, 73 U.S. 385, 18 L.Ed. 830 (1868).

Title 28, United States Code §§ 561 et seq. establishes and enables the United States Marshals Service. Though the sections discuss in detail the powers and duties of deputy marshals, no mention is made of special deputies and their powers or duties. There is no constitutional authority for the appointment of special deputies. There is regulatory authority for such appointments.

During the grand jury questioning of former Director John Twomey, Mr. Twomey testified that "[t]he original authority to appoint special deputy U.S. marshals comes from the original creation of the office of U.S. Marshal . . . [but] currently, . . . the U.S. Marshals Service authority to deputize someone as a special deputy U.S. marshal is limited by the Code of Federal Regulations, which specifies that we may deputize a federal employee or a state or local sworn law enforcement officer."

The regulatory authority is found among 28 CFR §§ 0.19, 0.111, and 0.112 (1996). Section 0.19 empowers the Associate Attorney General with the "power and authority... to authorize the Director of the U.S. Marshals Service to deputize persons to perform the functions of a Deputy U.S. Marshal." 28 CFR §0.19 (1996). Section 0.111 generally permits the Director "to direct and supervise all activities of the U.S. Marshals Service" and further provides a listing of specific activities which he oversees. Section 0.112 is entitled "Special Deputation," and states

> [T]he Director, United States Marshals Service, is authorized to deputize the following persons to perform the functions of a Deputy U.S. Marshal in any district designated by the Director:
> (2) Selected federal, state, or local law enforcement officers whenever the law enforcement needs of the U.S. Marshals Service so require . . . .

28 CFR § 0.112 (1996).

Lastly, Special Deputy United States Marshals are

distinguished from Deputy United States Marshals. 28 U.S.C. §§ 561, et. seq. contain the authority for the deputy U.S. marshals. Within these sections one can locate the parameters within which deputy marshals function. As previously stated, there is no discussion pertaining to special deputies and their duties, authority or function in general. Chapter 37, Title 28, does provide us with bases for distinctions between the two positions. One of the most apparent distinctions is found in 28 U.S.C. § 566 (d) which states that each "marshal, deputy marshal, and any other official of the Service as may be designated by the Director may carry firearms and make arrests without warrant for any offense against the United States . . . or for any felony cognizable under the laws of the United States if he or she has reasonable grounds to believe that the person to be arrested has committed or is committing such felony." John Twomey testified that with regard to the appointment of Bryant as a special deputy, this statutory authority enjoyed by deputy marshals was severely curtailed in the case of special deputies.

John Twomey, former Deputy Director of the United States Marshals Service testified before the grand jury in this cause that when he deputized Bryant as a special deputy, "it was solely for the purpose of being armed to provide safe and secure transport for police vehicles from ARGUS . . . ." (p.20). Twomey also testified that as a special deputy Bryant *did not possess the authority to carry a weapon for any other reason or at any other time*. This excludes the weaponry allowances delineated in § 566, and therefore, effectively excludes a special deputy from any entitlement as an officer or employee or "other official" under these sections.

Further, § 564 specifically provides that deputy marshals "may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof."

28 U.S.C. § 564 (1988). This statute, however, does not limit the deputy marshals' authority to that of a sheriff but, rather, supplements the implied powers of federal marshals. United States v. Laub Baking Co., 283 F. Supp. 217 (D.C. Ohio 1968). There is no indication anywhere that special deputies possess this latitude. Quite to the contrary, special deputies are very limited in their authority and are limited in the time and scope of the exercise of their restricted authority as evidenced, once again, by the identification badge disclaimer.

All one has to do is look at the actual appointment to clearly see that this position was honorary and no more than a fund-raising type position.

Lastly, even if arguendo, it can be said that this honorary title conferred employee/officer status, the record below does not support the findings and conviction. Title 18, United States Code, Section 912, requires two (2) essential elements, (A) the false personification and (B) acting as such.

Given all the due deference to the trial judge, Bryant was a mere braggart of his political friends, not a criminal, and his conduct did not rise to the level prohibited by Title 18, United States Code, Section 912. Furthermore, it was Rutherford, not Bryant who "acted as such" and obtained the forebearance by the Metro Police Department not to have Bryant arrested. United States v. Rosser, 528 F.2d 652 (D.C. Cir. 1976).

The Court's reliance on United States v. Maxwell, 920 F.2d 1028 (D.C. Cir.1990) is misplaced and distinguishable from the instant case.

In Maxwell, it was clear that the appellant, did in-fact,

hold herself out as an employee and officer of the United States Department of the Treasury, used printed letterheads, etc. However, in the instant case the testimony was contradicted and more importantly, the alleged office, existed, but, can not be said to be an officer or employee of the government, given the plain meaning of these terms.

Furthermore, reliance upon United States v. Diamond, 53 F.3d 249 (9th Cir. 1995) doesn't resolve the question of Bryant's status either, as in that case, the officer, clearly was acting at the direction, control and request of the U.S. Government. Again, that case is not on point, and really deals with Title 18, United States Code, Section 111 and 1114 which are not involved here and lend little if any support by analogy.

Even Judge Silberman concluded that it was very unlikely Bryant actually said he held the Special Deputy U.S. Marshal office at the scene. Your petitioner submits that the "very unlikely conclusion" certainly opened the door to the Court's jursdiction and should have allowed reversal, even given the great deference standard. Therefore, the petition herein should be granted to correct this gross injustice.

II.

WHETHER THE APPELLANT COURT HAD JURISDICTION TO CORRECT WHAT IT CALLED A "GROSS INJUSTICE"

Just a cursory reading of the opinion below clearly shows that the D.C. Circuit should have reversed the convicitions below even under the difficult standard of deference.

Conflicting testimony, questionable memory, bias and concern about an alleged "cover-up" abounded.

These unexplainable actions, alleged calls that never occured and selective memory all amounted to a huge gap in this case, preventing a conviction by a reasonable-minded jury.

There was no convincing evidence upon which a guilty verdict could be based.

Despite the prosecutors contempt for petitioner's wealth or family background, there exists a fundamental tenet in our criminal jurisprudence that a jury (or judge herein) should not premise its verdict upon a general evaluation of the defendant's character but rather upon an assessment of the evidence relevant to the particular crime with which the defendant is presently charged. United States v. Lauelle, 751 F.2d. 1266, 1275 (D.C. Cir. 1985); United States v. Sutton, 801 F.2d. 1346, 1360 (D.C. Cir. 1986)

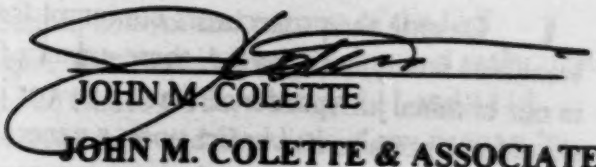
The standard governing review of a guilty verdict is to accord the verdict great deference and the conviction must be reversed when the evidence is such that a reasonable mind could not find guilt beyond a reasonable doubt. United States v. Caste Llanos, 731 F.2d. 979, 984 (D.C. Cir. 1984)

Your petitioner agrees with this standard, however the deference while great is not absolute and given the acknowleged conflict and related unusual events, the Court of Appeals should have reversed the conviction below.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



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